Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

ROBERT M. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JACK T. LASSITER
HATFIELD & LASSITER
401 West Capitol Avenue #502
Little Rock, AR 72201
(501) 374-9010

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 p/2

QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

ARE THE ATTORNEY GENERAL'S DECISIONS TO REFER MATTERS TO THE OFFICE OF INDEPENDENT COUNSEL DISCRETIONARY ACTS NOT SUBJECT TO JUDICIAL REVIEW EVEN WHEN THE ATTORNEY GENERAL'S REFERRALS ARE UNRELATED TO INDEPENDENT COUNSEL'S JURISDICTION, ARBITRARY, UNCONSTITUTIONAL, AND IN EXCESS OF AUTHORITY?

QUESTION II:

DID THE SUPPLEMENTAL AUTHORITY GRANTED TO THE OFFICE OF INDEPENDENT COUNSEL BY THE SPECIAL DIVISION VIOLATE THE APPOINTMENTS CLAUSE AND ARTICLE III OF THE UNITED STATES CONSTITUTION IN LIGHT OF THE UNCONSTITUTIONAL AUGUST 5, 1994, GRANT OF AUTHORITY TO THE OFFICE OF INDEPENDENT COUNSEL?

QUESTION III:

WERE THE OATHS GIVEN TO INDEPENDENT COUNSEL KENNETH STARR AND TO ASSISTANT TIM MAYOPOULOS VALID?

LIST OF ALL PARTIES TO THE PROCEEDING

All parties to the instant proceeding are Herby Branscum, Jr., P.A., Herby Branscum, Jr., individually, Robert M. Hill, P.A., Robert M. Hill, individually, the Perry County Bank, and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert M. Hill petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit filed on March 15, 1996.

OPINION BELOW

On March 15, 1996, a three judge panel of the United States Court of Appeals for the Eighth Circuit filed their Opinion affirming the United States District Court's ruling holding the petitioner in contempt for failing to comply with certain grand jury subpoenas issued during the course of the investigation by the Office of Independent Counsel (hereinafter "the OIC"). A copy of the Eighth Circuit's Opinion, which is cited as *In re: Grand Jury Subpoenas Duces Tecum,* 78 F.3d 1307 (8th Cir. 1996), is attached as Appendix A. Copies of the United States District Court's Orders, which were reviewed by the Eighth Circuit, are attached as Appendix D.

JURISDICTION

On March 15, 1996, a three judge panel of the United States Court of Appeals for the Eighth Circuit filed their Opinion affirming the United States District Court's Orders holding the petitioner and Herby Branscum, Jr., in contempt for failing to comply with certain grand jury subpoenas issued during the course of the OIC's investigation. (App. A) On April 19, 1996, the petitioner requested rehearing and suggested rehearing *en banc* by

the Eighth Circuit. The suggestion for rehearing *en banc* and the petition for rehearing by the panel were denied on June 3, 1996. (App. B) This petition is timely filed within 90 days thereof. Jurisdiction of this Court is founded on 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. II, Appointments Clause; United States Constitution, Art. III; Title 28 U.S.C. §591-599; Title 5 U.S.C. §3332; Title 5 U.S.C. §2903; and Title 5 U.S.C. §706. These sections are set out in the appendix. (App. G-1-26)

STATEMENT OF THE CASE

On September 8, 1995, Petitioner Hill, Mr. Branscum, their professional associations, and the Perry County Bank were held in contempt in the United States District Court for the Eastern District of Arkansas for refusing to comply with certain grand jury subpoenas issued during the course of the OIC's investigation. The Honorable Stephen Reasoner's September 8, 1995, Order levied fines of $1,000 a day against the individuals and their professional associations and a fine of $5,000 a day against Perry County Bank for each day of noncompliance. (App. D-14) On September 15, 1995, the final date before fines were to begin, Herby Branscum Jr., individually, Perry County Bank, and Robert M. Hill, P.A., responded to the grand jury subpoenas. Herby Branscum, Jr., P.A., and

Robert M. Hill remained in contempt. All parties appealed to the United States Court of Appeals for the Eighth Circuit. The events which led to the Order finding the petitioner in contempt follow.

On June 28, 1995, the OIC served grand jury subpoenas duces tecum on Herby Branscum, Jr., Herby Branscum, Jr., P.A. (Mr. Branscum's professional association through which he practices law), Robert M. Hill, Robert M. Hill, P.A. (Mr. Hill's inactive professional association through which he once practiced accounting), and the Perry County Bank. As to Mr. Branscum, Mr. Hill, and their professional associations, the four subpoenas requested document production evidencing contributions by them and their relatives to the 1990 William Jefferson Clinton gubernatorial campaign and Mr. Clinton's 1992 presidential campaign. The subpoenas also requested document production evidencing transfers of funds from Mr. Hill, Mr. Branscum, and their P.A.'s to certain listed persons, for the most part relatives. As to Perry County Bank, the subpoena requested document production evidencing expenses incurred by the Bank for the years 1990-1993 and substantiation for certain noted expenses as well as monthly account statements for Mr. Branscum, Mr. Hill, and their relatives.

On July 14 and 18, 1995, Mr. Branscum and Mr. Hill, respectively, filed under seal substantially identical motions to quash or modify these subpoenas raising, *inter alia*, the three questions presented in this petition. On July 19, 1995, the Bank filed a similar motion to quash. The OIC responded in opposition and the petitioner filed a reply thereto. On August 17, 1995, Judge Reasoner entered an order under seal denying the petitioner's

motions to quash or modify the subpoenas. (App. D-1) On August 22, 1995, the OIC moved for an order compelling the petitioner to produce by a date certain the documents called for by the subpoenas. The petitioner then filed a "Motion for Reconsideration, Clarification, and Supplemental Motion to Quash Subpoenas," which was denied on August 24, 1995, by Judge Reasoner. (App. D-12) In the same order, the court ordered the petitioner to deliver the subpoenaed documents on August 31, 1995. The petitioner did not comply, and the Office of Independent Counsel filed a Memorandum in Support of Application for Order to Show Cause, and an Affidavit in Support of Application for Order to Show Cause dated September 1, 1995.

A hearing was held before Judge Reasoner on September 8, 1995. Following the hearing, the court filed an order giving the petitioner and Mr. Branscum until September 15, 1995, to purge themselves of contempt by complying with the subpoenas *duces tecum* at issue. (App. D-14) The court further ordered that after September 15, 1995, fines of $1,000 per day were to be imposed on Herby Branscum, Jr., Herby Branscum, Jr., P.A., Robert M. Hill, and Robert M. Hill, P.A., for noncompliance and a fine of $5,000 per day was to be imposed on Perry County Bank for noncompliance. Robert M. Hill, P.A., Herby Branscum, Jr., individually, and the Perry County Bank complied with the subpoenas. Robert M. Hill and Herby Branscum, Jr., P.A., continued their noncompliance with the district court's orders. On September 8, 1995, Notice of Appeal was timely filed from the September 8 Order. Petitioner Hill, Mr. Branscum, and the Perry County Bank appealed from the district court's Orders of August 17,

August 24, and September 8, 1995. The district court had jurisdiction of this matter pursuant to 28 U.S.C §1826 and 18 U.S.C. §401. The jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon 28 U.S.C. §1291.

On March 15, 1996, the Eighth Circuit issued an opinion affirming the district court and holding that the Attorney General's referrals to the OIC were not subject to judicial review. (App. A) The court further held that the campaign contributions allegation peculiar to the case were related to OIC's original jurisdiction and any additional referrals by the Attorney General. (App. A) The court further held that Starr's failure to execute the 5 U.S.C. §3332 affidavit that Starr had not purchased the office was not a condition precedent to Starr's taking office and, therefore, his oath was valid and that of his assistant, Tim Mayopoulos. (App. A)

Prior to the Eighth Circuit's opinion, Mr. Hill paid his contempt fines and complied with the subpoena on December 5, 1995. However, relying on *Church of Scientology v. United States*, 506 U.S. 9 (1992), the Eighth Circuit determined that the issues raised on appeal were not mooted by the compliance.

Petitioner Hill and Mr. Branscum were indicted on February 20, 1996, and charged with misapplication of bank funds, false entries, and conspiracy. Following a lengthy trial, Petitioner Hill and Mr. Branscum were found not guilty on four counts and the jury was unable to reach a verdict on seven counts. Checks provided by

the petitioner when he complied with the subpoenas on December 5, 1995, were introduced by the OIC at trial.

REASONS FOR GRANTING THE WRIT

QUESTION I: ARE THE ATTORNEY GENERAL'S DECISIONS TO REFER MATTERS TO THE OIC DISCRETIONARY ACTS NOT SUBJECT TO JUDICIAL REVIEW EVEN WHEN THE ATTORNEY GENERAL'S REFERRALS ARE UNRELATED TO INDEPENDENT COUNSEL'S JURISDICTION, ARBITRARY, UNCONSTITUTIONAL, AND IN EXCESS OF AUTHORITY?

On August 5, 1994, the Special Division appointed Kenneth Starr as independent counsel and granted authority to Mr. Starr to investigate any individuals or entities who committed a violation of a federal criminal law other than Class B or C misdemeanors "relating in any way to James B. McDougal's, President William Jefferson Clinton's, and Mrs. Hillary Rodham Clinton's relationship with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." (App. E-1) The Special Division further extended to Mr. Starr a broader grant of power providing that "independent counsel shall have jurisdictional authority to investigate other allegations and violations by any person or entity developed during the independent counsel's investigation referred

to above and connected with or arising out of that investigation." (App. E-2) The subpoenas at issue in this matter were generated following letter referrals to the OIC from the Attorney General. (App. F) These letters reflected a finding by the Attorney General that certain matters which arose during the OIC's investigation were related to the August 5, 1994, Special Division grant of authority to Mr. Starr.

The Attorney General has the authority to investigate whether certain high-ranking government officials have violated any federal criminal law other than those violations classified as Class B or C misdemeanors upon receipt of information sufficient to constitute grounds for an investigation. 28 U.S.C. §591(a). If, after conducting the preliminary investigation, the Attorney General determines that further investigation is warranted, the Attorney General shall apply to the Special Division for the appointment of an independent counsel. 28 U.S.C. §592(c). In the application, the Attorney General shall set forth information with which to assist the Special Division in its selection of an independent counsel, as well as define the independent counsel's prosecutorial jurisdiction. 28 U.S.C. §592(d). Once the application of the Attorney General is received, the Special Division is to appoint an independent counsel and set forth the jurisdiction of that independent counsel. 28 U.S.C. §593(b). The Attorney General may refer other matters to independent counsel related to his jurisdiction. 28 U.S.C. §594(e).

United States District Court Judge Stephen Reasoner in his August 17, 1995, Order denying the petitioner's motions to quash found that the Attorney General's letters of referral to the OIC confirming relatedness were

not subject to judicial review. (App. D) The Eighth Circuit agreed (App. A), relying on *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996), (App. C), wherein the Eighth Circuit reversed United States District Court Judge Henry Woods, who had held to the contrary. Judge Woods relied on *Morrison v. Olson*, 487 U.S. 654 (1988), the watershed Supreme Court case which carefully delineated the fragile equilibrium which enabled the Ethics in Government Act, 28 U.S.C. §§591-599, to survive the constitutional challenges therein.

Mr. Hill argued to the Eighth Circuit that to hold such decisions of relatedness unreviewable presents the potential for unlimited investigatory and prosecutorial authority for the OIC in violation of the limited jurisdictional requirements which enabled the Ethics in Government Act to survive the appointments clause and Article III challenges in *Morrison v. Olson*.

The OIC has relied on two cases arguing that the Attorney General's determinations of relatedness under the Ethics in Government Act are not subject to review. *Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986), involved a suit by a member of Congress and two private citizens over the Attorney General's failure to conduct a preliminary investigation of a particular allegation. The Ninth Circuit held that the Attorney General's decision was a discretionary matter not subject to review. *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984), also held that a decision by the Attorney General not to conduct a preliminary investigation was not reviewable. Both cases dealt with decisions of the Attorney General before appointment of an independent counsel. Thus, neither case presented the opportunity to consider and address the

attendant constitutional considerations flowing from the appointment of an independent counsel.

The reviewability of the Attorney General's decision to refer matters to the OIC under 28 U.S.C. §594(e) has not been previously addressed by this Court.[1] Whether the decision to request appointment of an independent counsel is reviewable is entirely different from the post appointment issue of whether determinations of relatedness to the original grant of power to an independent counsel are reviewable.

The Eighth Circuit relied on legislative history, specifically the Conference Report of the 1987 Amendment, in holding that the determinations of the Attorney General are not subject to judicial review. *United States v. Tucker,*

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[1] 28 U.S.C. §594(e) provides –

> **Referral of other matters to an independent counsel.** – An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

78 F.3d 1313 (8th Cir. 1996), (App. C-8), cited as controlling in *In re: Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307 (8th Cir. 1996). (App. A) However, the examples set forth in the Conference Report to the 1987 Amendment all involved decisions prior to the appointment of an independent counsel.[2] Article II and Article III considerations concerning post appointment jurisdiction were not involved in these preappointment examples. Contrary to the Eighth Circuit's holding, 5 U.S.C. §706 grants review of an agency decision and allows the reviewing court to –

> hold unlawful and set aside any agency action, findings, and conclusions found to be:
>
> (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (b) contrary to constitutional right, power, privilege, or an immunity;
>
> (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . . .

Mr. Hill argued below that the referrals by the Attorney General at issue here were unconstitutional, arbitrary, and in excess of her authority, and, therefore, reviewable by the district court. *See also, Wade v. United States*, 504 U.S. 181 (1992) (holding that prosecutor's discretion is subject to constitutional limitations) and *Doe v. Casey*, 796 F.2d 1508 (D.C. Cir. 1986) (holding that review is available to determine if the Constitution has been

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[2] The examples are (1) whether to investigate a person under §591(c); (2) whether to exercise recusal from a case; and (3) whether to require appointment of an independent counsel.

violated even when agency action is committed to agency discretion by law.) The basis for the petitioner's assertions follow.

Pursuant to 28 U.S.C. §593, on August 5, 1994, the Special Division appointed Kenneth Starr as independent counsel and granted authority and jurisdiction to investigate any individuals or entities who committed a violation of a federal criminal law other than a Class B or Class C misdemeanor, "relating in any way to James B. McDougal's, President William Jefferson Clinton's and Mrs. Hillary Rodham Clinton's relationship with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc." (App. E-2) (This was referred to below by the petitioner as the "limiting grant.") The Special Division also extended a broader grant of power providing that independent counsel shall have jurisdictional authority to investigate other allegations and violations "by any person or entity developed during the independent counsel's investigation referred to above and connected with or arising out of that investigation." (App. E-2) (This grant was referred to below as the "broad grant.") The petitioner asserts that the "broad grant" is unconstitutional by authorizing independent counsel to "investigate violations by any person . . . developed during the independent counsel's investigation . . . connected with or arising out of that investigation." This broad grant gives independent counsel unlimited authority to investigate and prosecute anyone who coincidentally arises during the investigation.

The broad grant set forth above violates the standards of *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison v. Olson*, the court determined that the Ethics in Government Act did not violate the appointments clause of Article II in that independent counsel was an inferior officer empowered by the Act to perform only certain limited duties. *Id.* at 671. Another factor the court used to determine whether Article II was violated was that independent counsel's office is limited in jurisdiction. *Id.* at 672. The broad grant extended to the OIC in this case does not limit the OIC's duties or its jurisdiction and therefore violates Article II.

Further, the broad grant violates Article III. The United States Supreme Court pointed out that Congress may not give the division unlimited discretion to determine independent counsel's jurisdiction. *Id.* at 679. The Court stated, "[i]n order for the Division's definition of the counsel's jurisdiction to be truly 'incidental' to its power to appoint, the jurisdiction that the court decides upon must be *demonstrably related* to the factual circumstances that gave rise to the Attorney General's investigation and request for the appointment of the independent counsel in the particular case." *Id.* (Emphasis added.)

Subsequent to the Special Division's initial grant of authority, the Office of the Attorney General issued two relevant letters of referral to independent counsel asserting relatedness. (App. F) However, the letters do not make it clear whether the matters are related to the broad grant or the limiting grant. The first letter is dated September 2, 1994. (App. F-1) The second letter is dated June 21, 1995. (App. F-3) (The Special Division issued orders of supplemental authority addressing the same matters at

the request of Independent Counsel. (App. G) Those orders are dated December 19, 1994, and July 28, 1995, and are addressed *infra*. Those orders are not clear as to whether the matters are related to the "broad grant" or the "limiting grant.")

The September 2, 1994, letter referenced above was issued by the Acting Assistant Attorney General of the Department of Justice and stated that the Attorney General had concluded that the Perry County Bank-Clinton accounts matter was related to Mr. Starr's investigation and referred the investigation to the OIC. The letter states, "[a]fter reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that these matters are related to your investigation and that referral to your office would be appropriate." (App. F-1) This letter does not state whether the referral falls under the "broad grant" or the "limiting grant" in the August 5, 1994, Order of the Division. The matter referred to the OIC was in no way related to the "limiting grant." The letter reflects no attempt to demonstrate a relation to the "limiting grant."

The June 21, 1995, letter referenced above from the Assistant Attorney General of the Department of Justice referred the political contribution matter to the OIC as one related to the matters referred to Independent Counsel on September 2, 1994. The June 21 letter stated "[a]fter reviewing your description of the information developed in the course of the investigation conducted by the Office of Independent Counsel, she has concluded that this matter is related to one of the matters referred to you by the Department of Justice on September 2, 1994 (the letter

quoted in the preceding paragraph), and that referral to your office would be appropriate." (App. F-3) Again, the letter is unclear as to the section of the original grant of authority relied upon by the Attorney General in the earlier letter. The June 21, 1995 letter reflects nothing indicating relatedness between the matters in the June 21, 1995, letter and the earlier September 2, 1994, letter with the "limiting grant."

Petitioner Hill asserts that the grant of power to Mr. Starr to investigate anybody for anything which arises out of his investigation without the requirement that those areas be demonstrably related to the "limiting grant" violates *Morrison v. Olson's* equilibrium whether the referral comes from the Special Division or the Attorney General. Nothing in the Division's orders of referral or the Attorney General's letters cited above suggest that the subject matter of the referrals was directly related to the limiting grant in the August 5, 1994, Order with regard to Mr. McDougal's and the Clintons' relationship with Madison Guaranty, Whitewater Development Corporation, or Capital Management, Inc. Under *Morrison,* the referred matters under 28 U.S.C. §594(e) must be related to the previously defined prosecutorial jurisdiction of the OIC. *Morrison,* at 680, n. 18. The documents requested by the grand jury subpoenas directed to the petitioner are clearly unrelated to McDougal's and the Clintons' relationship to Madison Guaranty, Whitewater Development Corp., and Capital Management, Inc., the jurisdiction originally set forth by the Special Division. Therefore, the Attorney General's letters of referral do

not adhere to the limited jurisdiction requirement of *Morrison v. Olson* and are therefore unconstitutional and in excess of authority and are subject to judicial review.

The Attorney General's acts of referral are violative of 5 U.S.C. §706(a), (b), and (c). The Attorney General's referrals giving jurisdiction to the OIC should be reviewable because they were unconstitutional, arbitrary, and in excess of her authority for the reasons set forth above. The Eighth Circuit erred in holding that these referrals are not subject to judicial review and in affirming the district court's orders relating to the subpoenas.

QUESTION II: DID THE SUPPLEMENTAL AUTHORITY GRANTED TO THE OFFICE OF INDEPENDENT COUNSEL BY THE SPECIAL DIVISION VIOLATE THE APPOINTMENTS CLAUSE AND ARTICLE III OF THE UNITED STATES CONSTITUTION IN LIGHT OF THE UNCONSTITUTIONAL AUGUST 5, 1994, GRANT OF AUTHORITY TO THE OFFICE OF INDEPENDENT COUNSEL?

On August 5, 1994, the United States Court of Appeals for the District of Columbia, Division for the Purpose of Appointing Independent Counsel, Ethics in Government Act of 1978, As Amended, *In Re: Madison Guaranty Savings & Loan Association*, appointed Kenneth Starr as Independent Counsel. As set forth in Question I, the order contained a limiting grant concerning federal

violations relating in any way to James McDougal's, President Clinton's, or Mrs. Clinton's relationships with Madison Guaranty Savings & Loan Association, Whitewater Development Corporation, or Capital Management Services, Inc. The order also contained the aforementioned "broad grant" for Mr. Starr to investigate any person or entity developed during the investigation and connected with or arising out of the investigation. (App. E)

The Special Division issued orders of supplemental authority addressing the Perry County Bank-Clinton accounts matter and the campaign contribution matter on December 19, 1994, and July 28, 1995, respectively.[3] (App. G and H) These orders do not state whether the referred matters are related to the "broad grant," which violates the appointments clause and Article III of the United States Constitution as argued above.

The December 19, 1994, Order of referral stated –

> . . . IT IS HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matters be referred to the independent counsel, Kenneth W. Starr, and to the Office of the Independent Counsel (hereinafter collectively "the Office") as related matters pursuant to 28 U.S.C. §594(e):
>
> (1) whether any person committed any federal crime in connection with accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank. (App. H-1)

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[3] The July 28, 1995, order of referral was subsequent to the issuance of the subpoenas at issue and subsequent to all parties' motions to quash.

The order further stated that as a result of the referral of the matters and the jurisdictional grant in the aforementioned August 5, 1994, Order appointing Mr. Starr that Mr. Starr had jurisdiction to investigate if any individuals or entities had committed violations of criminal law relating to the McDougals' or the Clintons' relationship with Madison, Whitewater, or Capital Management. The order of referral then recited the unconstitutional broad grant restating that independent counsel further had jurisdiction to investigate any person or entity developed during independent counsel's investigations connected with or arising out of that investigation. (App. H-3)

The July 28, 1995, Order contained the identical language referencing the "broad grant" and the "limiting grant" as the December 19, 1994, Order authorizing the investigation as to "whether any person committed any federal crime in connection with contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or any other persons associated with them to the 1990 Clinton gubernatorial campaign or the 1992 Clinton presidential campaign." (App. G-1)

Neither the December 19 Order nor the July 28 Order indicate whether the referral is connected to the "limiting grant" or the "broad grant." Nothing on the face of the December 19 Order in any way connects accounts maintained by the 1990 Clinton gubernatorial campaign at the Perry County Bank to the "limiting grant." Nothing on the face of the July 28 Order of referral demonstrates any connection between contributions made by Herby Branscum, Jr., Robert M. Hill, members of their families, or other persons associated with them to the 1990 Clinton

gubernatorial campaign or the 1992 Clinton presidential campaign and the "limiting grant."

Nothing on the face of these orders connects these diverse matters because they are not related. In *Morrison v. Olson*, at 684-685, there are limits on the scope of prosecutorial jurisdiction which the Special Division can confer:

> We emphasize, nevertheless, that the Special Division has no authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications . . . the Division's exercise of unauthorized powers risk the transgression of the constitutional limitations of Article III that we have just discussed.

The Ethics in Government Act survived the challenge in *Morrison v. Olson* as a result of the limited jurisdiction extended to independent counsel. The acts of the Special Division in ordering related that which is unrelated to the limiting grant violate the appointments clause and Article III of the United States Constitution. The Eighth Circuit erred in finding these matters related and in affirming the district court's orders.

QUESTION III: WERE THE OATHS GIVEN TO INDEPENDENT COUNSEL KENNETH STARR AND TO ASSISTANT TIM MAYOPOULOS VALID?

The Eighth Circuit's Opinion of March 15, 1996, rejected the petitioner's arguments that the oaths given to Independent Counsel Kenneth Starr and his associate, Tim Mayopoulos, were invalid. (App. A) The Eighth Circuit held that the affidavit required by 5 U.S.C. §3332 was not a condition precedent to taking office.

5 U.S.C. §3332 required the filing of an affidavit as to the purchase or sale of office by Mr. Starr within 30 days after the effective day of his appointment. However, Mr. Starr did not comply with this section until August 29, 1995. Accordingly, since Mr. Starr had not complied with 5 U.S.C. §3332, Petitioner argued that Mr. Starr was not authorized to issue subpoenas and the subpoenas at issue should have been quashed.

Petitioner submits that any action Mr. Starr took before August 29, 1995, was void. Accordingly, Mr. Starr's attempt to appoint his associate, Mr. Mayopoulos, was void. Mr. Mayopoulos issued all subpoenas at issue herein. Mr. Mayopoulos is not an authorized person to issue the subpoenas in question and the subpoenas should have been quashed.

Even if Mr. Starr had complied with 5 U.S.C. §3332, a separate problem exists. Mr. Starr had no authority to administer the oath to Mr. Mayopoulos. The authority to administer oaths is set forth in 5 U.S.C. §2903, which provides as follows:

(a) The oath of office required by section 3331 of this title may be administered by an individual authorized by the laws of the United States or local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered.

(b) An employee of an Executive agency designated in writing by the head of the Executive agency, or the Secretary of a military department with respect to any employee of his department, may administer –

(1) the oath of office required by section 3331 of this title, incident to entrance into the executive branch; or

(2) any other oath required by law in connection with employment in the executive branch.

(c) An oath authorized or required under the laws of the United States may be administered by –

(1) the Vice President; or

(2) an individual authorized by local law to administer oaths in the State, District, or territory or possession of the United States where the oath is administered.

Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 411. Mr. Starr is not authorized by Arkansas law to administer the required oaths since he is not a notary in Arkansas. Likewise, there is no evidence of authorization to administer oaths under any other section of 5 U.S.C. §2903.

The Department of Justice Manual specifically sets out the individuals authorized to administer the oath and to delegate authority to administer the oath as follows:

> All employees are required to execute an oath of office (SF-61, Appoint Affidavit) upon appointment. *See* 5 U.S.C. §§2903, 3331. The head of the Executive Office is authorized to administer personally and to delegate authority to administer the oath of office. United States Attorneys and the Assistant Director, Personnel Staff are delegated such authority by the Director. Any delegation of this authority must be in writing.

Department of Justice Manual 3-2.312, p. 3-46. There is no evidence of any similar provision for the OIC.

CONCLUSION

Pursuant to United States Supreme Court Rule 10, Petitioner Robert M. Hill respectfully requests that this Court grant his Petition for Writ of Certiorari in that the Eighth Circuit has decided important questions of federal law that have not been but should be settled by this Court.

Respectfully submitted,

JACK T. LASSITER ABN 73072
HATFIELD & LASSITER
401 West Capitol Avenue #502
Little Rock, AR 72201
(501) 374-9010

Attorney for Robert M. Hill